Editor's note: Reconsideration granted; decision vacated -- See Elia Wassillie (On Reconsideration), 59 IBLA 361 (Nov. 9, 1981)

ELIA WASSILLIE

IBLA 76-75 Decided January 12, 1976

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting Native allotment application A-059278.

Affirmed.

1. Alaska: Native Allotments

Where the evidence shows that an applicant for a Native allotment has never occupied the land, the application will be rejected.

APPEARANCES: Henry W. Cavallera, Esq., Alaska Legal Services Corp., for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Elia Wassillie appeals from the June 4, 1975, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting his application for an allotment pursuant to the Alaska Native Allotment Act, 34 Stat. 197, as amended, 43 U.S.C. § 270-1 to 270-3 (1970). That Act has been repealed by section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (Supp. III, 1973). However, applications pending before the Department on December 18, 1971, may be processed to conclusion.

[1] Both the Alaska Native Allotment Act and the pertinent regulation, 43 CFR 2561.2, require that a Native demonstrate 5 years of substantially continuous use and occupancy before he may receive an allotment. Another regulation, 43 CFR 2561.0-5, provides, in part:

> (a) The term "substantially continuous use and occupancy" contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use.

Appellant's application was filed with the BLM on June 5, 1963, alleging occupancy from February 7, 1963. Evidence of use and occupancy was filed on January 7, 1970, alleging use and occupancy from 1959. In it he claimed that the land was improved with a cabin, an outhouse and a storage cache, and he stated, "This land is my home." A field examination was conducted in May 1970. That report states in part:

> Wassillie has no improvements on the claim and was reportedly living in Levelock on both 3/3/70 and 5/28/70. He is the son of Nick Wassillie who does live in Igiugig. According to the several villagers interviewed, he is holding the claim with the intent to perhaps build at some future time. He does move around as a commercial and subsistence fisherman but he has never built on or used the tract. The villagers Simon Zackar, Murphy Nickolai, Andrew Paine, and Gabby Gregory apparently believed that this was a legitimate reason for filing and indicated that it was done to protect the area from intruding filings--a very valid reason several years ago.

The report further stated that "no use or occupancy has been made by the allottee even up to the present time."

A supplemental field report was filed in 1974. That report states:

> On March 3, 1970, John W. Merrick made a field exam on the subject land. His field report of June 10, 1970, indicates he found no evidence of use or occupancy on the subject land.
>
> On September 23, 1973, Phil Moreland re-examined the parcel while working other Native allotments in the area. An extensive search by helicopter and subsequent ground examination located two corner posts as shown on the attached USGS. There were also some public use trails leading out of the village of Igiugig. While examining the parcel I talked to Mr. Andrew Paine. He and his family were picking cranberries on Wassillie's allotment. Mr. Paine indicated that Elia Wassillie lives in Iliamna now. No visible evidence of use or occupancy belonging to the applicant, except the signs, was found on the allotment. From the physical evidence found I conclude any use the applicant is making on the land is intermittent in nature and not potentially exclusive.

The BLM notified appellant by letter received on March 31, 1975, that he had 60 days in which to submit additional evidence of use and occupancy, failing which, his application for allotment would be rejected. On June 4, 1975, the BLM rejected appellant's application without having received any further evidence of occupancy. On June 30, 1975, appellant submitted three statements of witnesses who assert that he used and occupied the land in the required manner. On July 7, 1975, the BLM received appellant's notice of appeal and transmitted the files to this office. 1/ On September 24, 1975, the Chief Administrative Judge and Chairman of the Board of Land Appeals, Newton Frishberg, informed attorneys of the Alaska Legal Services Corporation that:

> The Board will not give favorable consideration to new or additional evidence submitted with an appeal in the absence of a showing satisfactory to it why the evidence was not submitted to BLM within the 60-day period afforded the applicant to submit a further showing in support of his application.
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> It is the general practice of the Board not to consider new evidence submitted on appeal in resolving a matter on its merits, but to remand the case to BLM for further consideration where such new evidence, if true, might change the outcome. It was precisely to enable applicants to submit such new evidence at the proper level that BLM provided an additional 60 days and longer before making its decision in each case. To remand cases to BLM upon the basis of new evidence submitted to the Board for the first time, after the extensive opportunities granted below, would negate the purpose for providing those opportunities and result in endless, undue delays.
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> Where new evidence has been submitted with the statements of reasons already filed, the Board hereby grants until November 3, 1975, or 60 days from the filing of the notice of appeal, whichever is longer, in which to explain why the evidence was not submitted

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1/ Notice of appeal must be filed within 30 days. 43 CFR 4.411; Martha Charlie, 22 IBLA 287 (1975). However, a grace period of 10 days is allowed where it appears that the notice was mailed within the 30-day period even though not received until later. 43 CFR 4.401. The notice herein is dated July 3, 1975, and was received July 7, 1975. It appears that it was sent within the 30-day period.

> to BLM prior to its decision. Any future offers of evidence must be accompanied by such a showing. In the absence of such showing, newly offered evidence will not be favorably considered by the Board.

Clearly, the late-filed statements should be disregarded.

Even if the statements were to be considered they would only detract from appellant's case. The "witnesses" state variously that appellant's occupancy began in 1950, in 1952, and "several years [ago?]." Appellant himself asserted occupancy no earlier than 1959 in one document, and as of February 7, 1963, by another. The field examinations and statements of other villagers indicate that appellant has never occupied the land. In sum, there is no credible evidence that appellant has ever occupied the land in a manner at least potentially exclusive of others. See John Nanalook, 17 IBLA 353 (1974).

Appellant requests alternatively that we either grant him an allotment or a hearing. As the law does not allow an allotment on the evidence presented, an allotment will not be granted. Nor does a hearing appear likely be productive of evidence which would change the result. A hearing is therefore denied. Due process does not require a hearing in this case. Pence v. Morton, 391 F. Supp. 1021 (1975), appeal docketed, No. 2144 (9th Cir. May 23, 1975).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge